

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ABEL V., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ABEL V.,

Defendant and Appellant.

D055051

(Super. Ct. No. J221524)

APPEAL from an order of the Superior Court of San Diego County, Amalia L.
Meza and Carolyn M. Caietti, Judges. Reversed.

A petition filed in the juvenile court alleged Abel V. committed felony vandalism with damage in the amount of \$400 or more (Pen. Code, § 594,¹ subds. (a) & (b)(1)) and unlawfully possessed vandalism tools (§594.2, subd. (a)), a misdemeanor. At a contested

¹ Statutory references are to the Penal Code unless otherwise specified.

adjudication hearing, the court sustained the allegations on the felony vandalism count, dismissed the misdemeanor possession count, and declared Abel a ward of the court under Welfare and Institutions Code section 602. At the disposition hearing, the court placed Abel under the supervision of the probation department with various terms and conditions, including orders to complete 40 hours of community service and pay \$1,452.78 in restitution and \$219 in fines.

Abel appeals, contending (1) the evidence was insufficient to support the felony vandalism true finding; (2) the felony vandalism true finding should be reduced to a misdemeanor; and (3) the \$119 fine imposed under Welfare and Institutions Code section 730.5 should be stricken because the court failed to make an appropriate finding of his ability to pay. We conclude there was not substantial evidence to support a true finding of either felony or misdemeanor vandalism, and therefore reverse. Because we reverse the order, we need not reach the issue of whether the court properly imposed the Welfare and Institutions Code section 730.5 fine.

FACTS

On July 22, 2008, Albertina Nevills, resident property manager for an apartment complex, heard several people talking and metal banging in the parking lot outside her apartment around 1:15 a.m. Nevills looked out her second floor bedroom window and saw five males trying to break into a car. Nevills called the sheriff's department and continued to watch from her window. Two of the males, wearing bulky, hooded sweatshirts and dark-colored jeans, began spraying the ground and some garages with

spray paint cans. Nevills was unable to identify any of the males she saw and heard spray painting because they were "all covered."

As security patrol and deputies arrived, the five males ran toward the rear of the property and in the general direction of a certain apartment. About 10 to 15 minutes later, while police were searching the complex and the adjoining community, Nevills saw two individuals running back toward her building. One of them wore a white T-shirt and the other wore a dark blue T-shirt; neither wore a hooded sweatshirt or carried spray paint cans.

When Deputy Darryl McNeal arrived at the complex early that morning, Nevills told him she thought Abel was one of the individuals she saw running back toward her after the incident. Abel, who lives in Las Vegas, had been staying with his aunt in her apartment at the complex for about a week at that time. Nevills had never spoken to Abel, and she had only previously seen him "a couple of times."

McNeal contacted Abel in his aunt's apartment. Abel appeared to be awake already. Abel's aunt, Eunice, and two other youths were also in the apartment. Eunice said she was unaware of anyone entering or leaving her apartment that morning. Abel told McNeal he had not left the apartment all night. McNeal searched Abel and did not find any graffiti tools on him or any spray paint cans in the apartment. Abel did not have any visible paint on his hands or clothing.

McNeal photographed Abel and another male in the apartment. He showed Nevills the two photographs, along with photographs of two other individuals. Nevills identified the photograph of Abel as one of the two people she saw running back toward

her after the incident. Nevills also later identified Abel in court as one of the two individuals in T-shirts she saw running that night.

The next morning, Nevills inspected the apartments and discovered fluorescent green graffiti throughout the complex. The graffiti was not there the previous day. The graffiti read "VSM" and "Ghost Town." "VSM" signifies Varrio San Marcos, a San Marcos street gang. Nevills testified the cost of cleaning up and repainting all of the graffiti in the complex was around \$2,000.

Abel testified he did not spray paint any of the grounds at the apartment complex. Abel also testified he has three tattoos. According to Abel, none of the tattoos were gang related and he is not a member of any gang, although he knew a "Ghost" gang member. To McNeal's knowledge, Abel has never been documented or identified as a gang member.

DISCUSSION

Abel challenges the sufficiency of the evidence to support the court's true finding he committed felony vandalism. In the alternative, Abel contends the felony vandalism true finding should be reduced to a misdemeanor because even if he did commit the vandalism, there was insufficient evidence he caused \$400 or more in damage. We conclude there was not substantial evidence Abel committed either felony or misdemeanor vandalism, and therefore reverse.

I

STANDARD OF REVIEW

When a defendant challenges a conviction for insufficient evidence, we apply the substantial evidence standard of review. We presume all reasonable inferences in favor of the judgment. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633.) The evidence must be reasonable, credible, and of solid value, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260 (*Cuevas*).) Substantial evidence " 'cannot be deemed synonymous with "any" evidence.' " (*Kuhn, supra*, 22 Cal.App.4th at p. 1633.) " 'A decision supported by a mere scintilla of evidence need not be affirmed on review.' " (*Ibid.*) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652; *Cuevas, supra*, at p. 261.)

II

NO SUBSTANTIAL EVIDENCE SUPPORTS A FINDING OF EITHER FELONY OR MISDEMEANOR VANDALISM

An individual commits felony vandalism when he maliciously defaces with graffiti another's property and causes damage of \$400 or more. (§ 594, subd. (a)(1), (b)(1).) If the amount of damage from the vandalism is less than \$400, the offense is punishable as a misdemeanor. (§ 594, subd. (b)(2)(a).) The prosecution may prove a defendant's guilt with either direct or circumstantial evidence, but it must prove every element of the crime beyond a reasonable doubt. (*People v. Kennedy* (1951) 101 Cal.App.2d 709, 711;

Cuevas, supra, 12 Cal.4th at p. 260.) For a conviction based on circumstantial evidence, there must be no possible "rational conclusion of innocence" when the court gives the evidence "all the legal effect toward guilt which it could support." (*People v. Redrick* (1961) 55 Cal.2d 282, 289-290.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Here, the juvenile court's true finding is unsupported by any direct evidence linking Abel to the spray painting. Nevills, the only witness to the vandalism, could not identify any of the individuals she saw spray painting or standing around the parking lot outside her window. Abel did not have any spray paint on his hands or clothing, despite allegedly carrying out a massive spraying campaign across the entire apartment complex. Likewise, police did not find any spray paint cans in Abel's possession or in his aunt's apartment. The only evidence actually connecting Abel to the crime was circumstantial.

Even at full strength, however, the circumstantial evidence linking Abel to the vandalism only raises a suspicion he was involved in the spray painting. Essentially, the court's finding rested on Nevills's identification of Abel as one of the two individuals she saw running back toward her 10 to 15 minutes after the vandalism occurred. Even assuming Nevills correctly identified Abel running away from deputies, " '[t]he flight of a person immediately after the commission of a crime . . . is not sufficient in itself to establish his guilt.' " (*People v. Jurado* (2006) 38 Cal.4th 72, 126.) Abel may have been running for a number of reasons that night, including possibly innocent motives. He may have been outside and had nothing to do with the vandalism, yet still ran from the

deputies because he feared getting in trouble for being out late at night. In any case, no other evidence linked Abel to the five males Nevills actually saw involved in spray painting the complex.

The running individual Nevills identified as Abel wore a T-shirt, while all five of the males she saw previously wore bulky, hooded sweatshirts. Neither of the two individuals Nevills saw running carried spray paint cans or any other graffiti tools. Furthermore, the spray paint throughout the complex consisted of gang signs, but there is no evidence Abel was in a gang. The circumstantial evidence simply does not rise to the level of substantial evidence necessary to support a true finding. Therefore, we reverse the true finding Abel committed felony vandalism and do not reduce the offense to misdemeanor vandalism.

DISPOSITION

The order is reversed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.